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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

|                                |   |                      |
|--------------------------------|---|----------------------|
| WILLIAM WITTER,                | ) |                      |
|                                | ) |                      |
| Petitioner,                    | ) | 2:01-CV-1034-RLH-LRL |
|                                | ) |                      |
| vs.                            | ) |                      |
|                                | ) | <b>ORDER</b>         |
| E.K. McDANIEL, <i>et al.</i> , | ) |                      |
|                                | ) |                      |
| Respondents.                   | ) |                      |
|                                | ) |                      |
|                                | / |                      |

Presently before the court is petitioner William Witter's Motion for Stay and Abeyance (docket #76), respondents' Motion to Dismiss Petition for Writ of Habeas Corpus (docket #84),<sup>1</sup> and petitioner's Request for an Evidentiary Hearing (docket #127). Each of these motions has been fully briefed by the parties.

**I. Background**

On June 28, 1995, a jury in the Eighth Judicial District Court for Nevada found Witter guilty of first degree murder with use of a deadly weapon, attempted murder with use of a deadly weapon, attempted sexual assault with use of a deadly weapon, and burglary. On July 13, 1995, the jury imposed a sentence of death for the murder. On August 11, 1995, the state district court filed the amended judgment of conviction. Witter appealed.

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<sup>1</sup> In conjunction with their motion to dismiss, respondents filed a Motion for Leave to File Excess Pages (docket #85), which shall be granted *nunc pro tunc* as of June 14, 2006, the date both motions were filed.

1 On July 22, 1996, the Nevada Supreme Court affirmed Witter's conviction and  
2 sentence. After the Nevada Supreme Court denied Witter's petition for rehearing, he petitioned the  
3 United States Supreme Court for a writ of certiorari. On May 12, 1997, the Court denied Witter's  
4 petition. On October 27, 1997, Witter filed a petition for writ of habeas corpus in the state district  
5 court. On February 26, 1999, the state district court held an evidentiary hearing on the petition. On  
6 September 25, 2000, the court entered a written order denying relief. Witter appealed.

7 On August 10, 2001, the Nevada Supreme Court affirmed the lower courts' decision.  
8 On September 4, 2001, this court received Witter's initial petition for writ of habeas corpus pursuant  
9 to 28 U.S.C. § 2254. See docket #5. Though nominally filed in *propria persona*, the petition  
10 appears to have been prepared by, or with the assistance of, state post-conviction counsel, David  
11 Schieck.

12 On September 17, 2001, this court appointed the Federal Public Defender's office  
13 (FPD) to represent Witter. On November 23, 2005, after protracted discovery litigation and several  
14 extensions of time, Witter filed an amended petition for writ of habeas corpus advancing twelve  
15 grounds for relief. Docket #67.

## 16 II. Discussion

### 17 A. Stay and Abeyance

18 Witter requests that this court stay and hold in abeyance his federal habeas  
19 proceedings while he returns to state court to exhaust his remedies for his currently unexhausted  
20 claims. He asserts that stay and abeyance is warranted in order to allow him to pursue exhaustion in  
21 state court without being time-barred under 28 U.S.C. § 2244(d) when he returns to this court post-  
22 exhaustion. In *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court held that, to prevent  
23 petitioners from "forever losing their opportunity for any federal review of their unexhausted  
24 claims," a district court has discretion to stay a mixed petition (i.e., a petition containing both  
25 exhausted and unexhausted claims). *Id* at 275. The Court also held, however, that that discretion is  
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1 limited by AEDPA's<sup>2</sup> twin purposes: "reduc[ing] delays in the execution of state and federal criminal  
2 sentences" and encouraging state "petitioners to seek relief from state courts in the first instance." *Id.*  
3 at 276 (internal quotation marks omitted). Thus, the Court concluded that stay-and-abeyance is  
4 appropriate only when the district court determines that there was "good cause" for the petitioner's  
5 failure to exhaust his claims and is improper when the unexhausted claims are "plainly meritless" or  
6 where the petitioner has engaged in "abusive litigation tactics or intentional delay." *Id.* at 277-78.

7           Accordingly, *Rhines* provides broad guidance as to how the district court is to treat a  
8 habeas petition containing unexhausted claims. First, "it likely would be an abuse of discretion for a  
9 district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his  
10 failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that  
11 the petitioner engaged in intentionally dilatory litigation tactics." *Id.* at 278. Second, where the  
12 foregoing requirements for a stay are not met, "the court should allow the petitioner to delete the  
13 unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition  
14 would unreasonably impair the petitioner's right to obtain federal relief." *Id.*

15           In opposing Witter's motion for stay and abeyance (docket #86), respondents refer to  
16 their concurrent motion to dismiss (docket #84), wherein they argue that each of Witter's claims is  
17 unexhausted. While they do not maintain that the procedure is necessarily inappropriate in this case,  
18 they contend that Witter's request for stay is premature until the court makes a determination as to  
19 which claims, if any, are exhausted. Docket #86. According to the respondents, a determination that  
20 *all* of Witter's claims are unexhausted would require a dismissal of the entire action under *Rose v.*  
21 *Lundy*, 455 U.S. 509, 510 (1982). *Id.* Respondents further argue that, prior to a ruling on which  
22 claims are or are not exhausted, they cannot fully address the merits of Witter's request for a stay.  
23 *Id.*

24           In replying to respondents' opposition, Witter argues that Claims One, Two(B), and

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25           <sup>2</sup> The Antiterrorism and Effective Death Penalty Act of 1996.  
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1 Five(C) of his petition are clearly exhausted. Docket #121. He also argues that, even if the court  
2 determines that his petition is wholly unexhausted, it still has the authority, in accordance with  
3 *Rhines* and *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), to hold the petition in abeyance. *Id.*

4 A claim-by-claim exhaustion determination has not been, heretofore, a prerequisite  
5 for the use of the stay and abeyance procedure in this court's habeas cases. Certainly, a  
6 determination as to which specific claims the petitioner has yet to exhaust brings focus to the *Rhines*  
7 analysis. Even so, nowhere in *Rhines* does the Court state or suggest that every unexhausted claim in  
8 the petition must satisfy, individually, the "good cause" and "potentially meritorious" requirements  
9 before a stay will be permitted. Arguably, a stay is warranted under *Rhines* as long as at least one of  
10 the unexhausted claims has potential merit and the petitioner can demonstrate good cause for not  
11 exhausting his state court remedies for that claim prior to filing his federal petition. Indeed, the  
12 rationale for permitting a stay would apply with more force to a petition in which only one of the  
13 unexhausted claims meets the *Rhines* requirements, but is clearly meritorious, than it would to a  
14 petition in which all of the unexhausted claims meet the *Rhines* requirements, but none are more  
15 than potentially meritorious.

16 Likewise, in most cases, there is little point to selecting out the particular claims for  
17 which the petitioner will be entitled to a stay and those for which he is not. That is, the court is not  
18 inclined to limit petitioner's stay to allow exhaustion of only those claims that specifically meet the  
19 *Rhines* requirements. Perhaps, there will be instances where the inclusion of plainly meritless claims  
20 runs the risk of unduly prolonging the state court exhaustion proceedings. In the absence of any  
21 indication that will be the case, however, the federal court should not dictate which claims the  
22 petitioner is permitted to raise in his return to state court.

23 Lastly, as to respondents' contention that this court must dismiss, not stay, the  
24 petition if it is wholly unexhausted, this court finds some merit in Witter's countervailing argument  
25 based on the Supreme Court's dicta in *Pace*. In *Pace*, the Court held that, to avoid running the risk  
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1 of finding out too late that his state proceeding did not toll the one-year statute of limitations under §  
2 2244(d)(2), a petitioner could “fil[e] a ‘protective’ petition in federal court and ask[] the federal  
3 court to stay and abey the federal habeas proceedings until state remedies are exhausted.” 544 U.S.  
4 at 416 (citing *Rhines*). By not indicating that this tactic is only available if the “protective” petition  
5 is also a “mixed” petition, the Court implies that stay and abeyance is available irrespective of  
6 whether any of the petitioner’s claims have been exhausted. In the absence of a more definitive  
7 statement, however, this court is bound by a Ninth Circuit decision issued subsequent to both *Rhines*  
8 and *Pace*. See *Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9<sup>th</sup> Cir. 2006). In *Raspberry*, the court of  
9 appeals expressly declined to extend the rule in *Rhines* to petitions containing only unexhausted  
10 claims. *Id.* Accordingly, this court is unable to employ the stay and abeyance procedure unless  
11 Witter’s petition contains at least one exhausted claim.

12           Based on the foregoing, Witter is entitled to stay and abeyance if his petition is a  
13 mixed petition that contains an unexhausted claim (or claims) that is potentially meritorious and for  
14 which he can show good cause for failing to earlier exhaust in state court. On the issue of whether  
15 his petition qualifies as a mixed petition, Witter identifies three claims that he contends are  
16 exhausted – Claims One, Two(B), and Five(C). See docket #121, p. 4-9.

17           In Claim One, Witter alleges that several of his constitutional rights were violated  
18 because the prosecutor used his peremptory challenges in an intentionally discriminatory manner to  
19 exclude African-American women from the jury. Docket #67, p. 17-54. He argues that he  
20 exhausted remedies for this claim in his appeal of the lower court’s denial of his state post-  
21 conviction petition. This argument fails, however, because the claim presented to the Nevada  
22 Supreme Court on collateral attack involved an alleged violation arising under his right to effective  
23 assistance of appellate counsel, but not a violation of the underlying constitutional violations Witter  
24 now advances in Claim One. See Amended petition, Exhibit 4.3, p. 24-27.

25           A petitioner satisfies the exhaustion requirement by providing the highest state court  
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1 with a full and fair opportunity to consider all claims before presenting them to the federal court.  
2 *Picard v. Connor*, 404 U.S. 270, 276 (1971). Both the legal substance and the operative facts must  
3 be presented to the state courts. *O'Sullivan v. Boerckel*, 526 U.S. 838, 842-845 (1999). The  
4 Supreme Court has “emphasized that mere similarity of claims is insufficient to exhaust.” *Duncan v.*  
5 *Henry*, 513 U.S. 364, 366 (1995). Caselaw in this and at least one other circuit support the position  
6 that, for exhaustion purposes, an ineffective assistance of counsel claim is separate and independent  
7 from the underlying constitutional violation upon which it is based. *Kelly v. Small*, 315 F.3d 1063,  
8 1068 (9<sup>th</sup> Cir. 2003); *Lordi v. Ishee*, 384 F.3d 189, 194 (6<sup>th</sup> Cir. 2004). Accordingly, Claim One is  
9 unexhausted because the federal claims in Claim One were not squarely presented to the Nevada  
10 Supreme Court in Witter’s post-conviction proceeding.

11           On the other hand, Claims Two(B) and Five(C) are both exhausted. In Claim  
12 Two(B), Witter alleges that his constitutional rights were violated because the trial court did not  
13 permit counsel to ask prospective jurors whether they were able to consider the two life sentences  
14 option if they knew he had committed prior violent felonies. Docket #67, p. 62. In Claim Five(C),  
15 he alleges that his constitutional rights were violated by the admission of certain portions of the  
16 penalty-phase testimony of Kathryn Cox, one of his victims. *Id.*, p. 83. Witter fairly presented each  
17 of these claims to the Nevada Supreme Court in his direct appeal. Docket #121, Exhibit 1, pp. 13-  
18 19, 36-37. As such, his current federal petition qualifies as a “mixed petition.” Thus, the remaining  
19 questions that must be answered before a stay is granted are (1) whether any of the claims he seeks to  
20 exhaust are potentially meritorious and (2) whether he can show good cause for not having exhausted  
21 those claims in state court.

22           With respect to the “potentially meritorious” inquiry, the standard should approximate  
23 the standard that applies when the court decides whether to deny an unexhausted claim under 28  
24 U.S.C. § 2254(b)(2). *See Rhines*, 544 U.S. at 277. In both instances, the objective is to preserve the  
25 principle of comity while preventing the waste of state and federal resources that occurs when a  
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1 petitioner is sent back to state court to litigate a clearly hopeless claim. *Cf. Cassett v. Stewart*, 406  
2 F.3d 614, 624 (9<sup>th</sup> Cir. 2005). Thus, Witter should not be prevented from returning to state court  
3 unless “it is perfectly clear that [he] does not raise even a colorable federal claim.” *Id.*

4           Having reviewed the claims that Witter identifies as those he wishes to present in a  
5 return trip to state court, this court finds that at least some of them, if taken as true, arguably present  
6 a meritorious challenge to his conviction or sentence. In particular, Claims Eight and Nine, the  
7 unexhausted claims for which Witter most strenuously argues for a stay, both fit in this category.

8           In Claim Eight, Witter claims his death sentence is unconstitutional because the state  
9 used the same felony charges both to support his conviction on a felony murder theory and to support  
10 one of the aggravating factors. Relying primarily on *Lowenfield v. Phelps*, 484 U.S. 231 (1988), the  
11 Nevada Supreme Court has concluded that it violates the Constitution “to base an aggravating  
12 circumstance in a capital prosecution on the felony upon which a felony murder is predicated.”  
13 *McConnell v. State*, 102 P.3d 606, 624 (Nev. 2004). Based on Witter’s allegations under Claim  
14 Eight, the *McConnell* holding is potentially applicable to his case.<sup>3</sup> Because the claim provides  
15 Witter with at least some chance of habeas relief, Claim Eight satisfies the “potentially meritorious”  
16 standard in *Rhines*.

17           In Claim Nine, Witter alleges that the state committed various acts of prosecutorial  
18 misconduct in relation to the penalty phase of his trial. A substantial portion of Claim Nine is based  
19 on contentions that the state failed to disclose material evidence that would have undermined the  
20 state’s arguments in support of imposing the death penalty and that the state knowingly offered false  
21 or misleading testimony and evidence. Claim Nine contains factual allegations sufficient to raise  
22 colorable grounds for relief under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Napue v. Illinois*, 360

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24           <sup>3</sup> Moreover, the Nevada Supreme Court has recently decided that the rule announced in  
25 *McConnell* may be applied retroactively in Nevada post-conviction proceedings challenging death  
26 penalty judgments that became final pre-*McConnell*. *Bejarano v. State*, 2006 WL 3319541, \*6 (Nev.  
November 16, 2006).

1 U.S. 264 (1959). Thus, it also satisfies the “potentially meritorious” standard in *Rhines*.

2           While *Rhines* does not go into detail as to what constitutes good cause for failure to  
3 exhaust, the Ninth Circuit has since held that the test is less stringent than an "extraordinary  
4 circumstances" standard. *Jackson v. Roe*, 425 F.3d 654, 661-62 (9<sup>th</sup> Cir. 2005) (citing *NLRB v. Zeno*  
5 *Table Co.*, 610 F.2d 567, 569 (9<sup>th</sup> Cir. 1979)). However, the Ninth Circuit has not provided  
6 additional guidance as to the meaning of "good cause." This court has suggested that good cause  
7 under *Rhines* "should not be so strict a standard as to require a showing of some extreme and unusual  
8 event beyond the control of the defendant." *Riner v. Crawford*, 415 F.Supp.2d 1207, 1210 (D.  
9 Nev.2006). The court concluded, instead, that the petitioner must show that "he was prevented from  
10 raising the claim, either by his own ignorance or confusion about the law or the status of his case, or  
11 by circumstances over which he had little or no control." *Id.* at 1211.

12           For Claim Eight, Witter contends that good cause exists for his failure to exhaust  
13 because *McConnell* was not decided until he had completed his state proceedings. Because  
14 *McConnell* explicitly overruled preexisting caselaw and announced a new basis upon which Witter  
15 might challenge his death sentence (*see Bejarano*, 2006 WL 3319541, at \*4), the court finds merit in  
16 his good cause argument. A showing that the factual or legal basis for a claim was not reasonably  
17 available to counsel has been recognized as sufficient to establish cause for the purpose of excusing a  
18 procedural default. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). Although there is currently  
19 no clear controlling authority on the issue, most courts have concluded that the “good cause”  
20 necessary for stay and abeyance is either the same as or more generous than the showing needed for  
21 “cause” to excuse a procedural default. *See, e.g., Rhines v. Weber* ( “*Rhines II* ”), 408 F.Supp.2d  
22 844, 849 (D. S.D. 2005) (“Supreme Court suggested a more expansive definition of ‘good cause’ in  
23 *Pace* and *Rhines* than the showing needed for ‘cause’ to excuse a procedural default”). Accordingly,  
24 the court finds good cause exists to excuse Witter’s failure to exhaust Claim Eight in state court.

25           As for his failure to exhaust Claim Nine, Witter cites the state’s alleged failure to  
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1 disclose material exculpatory evidence; more specifically, documents from various government  
2 agencies that, according to Witter, would have undermined the state's claims of gang membership  
3 and future dangerousness. Relying on *Banks v. Dretke*, 540 U.S. 668, 691-95 (2004), Witter argues  
4 that the state's suppression of this evidence provides good cause to excuse his failure to present his  
5 prosecutorial misconduct claims in state court. Although *Banks* addressed the cause issue in a  
6 slightly different context (i.e., to decide whether petitioner was entitled to present evidence in federal  
7 court that he had failed to present in state court), the case is persuasive for the purposes of the  
8 present *Rhines* inquiry. Moreover, respondents have offered no argument in opposition to a finding  
9 of good cause. As such, the court concludes that Witter has shown good cause sufficient to excuse  
10 his failure to exhaust Claim Nine in state court.

11 In summary, Witter had good cause for his failure to exhaust Claims Eight and Nine;<sup>4</sup>  
12 and, the claims are potentially meritorious. Also, the court finds that there is nothing in the record to  
13 indicate that Witter has engaged in "intentionally dilatory litigation tactics" either in pursuing his  
14 claims in the state courts or in this court. *Rhines*, 544 U.S. at 277. Thus, Witter's request for a stay  
15 and abeyance shall be granted.

16 B. *Remaining Motions*

17 Having found that a stay and abeyance is appropriate in this case, the court shall deny  
18 respondents' Motion to Dismiss Petition for Writ of Habeas Corpus (docket #84) without prejudice.  
19 If Witter fails to obtain the relief he seeks in state court, respondents shall be free to renew the  
20 motion upon Witter's return to this court. Likewise, Witter's Request for an Evidentiary Hearing  
21 (docket #127) shall also be denied inasmuch as Witter's stated purpose in asking for a hearing was to  
22 present evidence in support of his opposition to respondents' motion to dismiss.

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24 <sup>4</sup> The court has limited its *Rhines* analysis to Claims Eight and Nine primarily because these are  
25 the two claims on which Witter has focused in arguing that he is entitled to a stay. See docket #121, p.  
26 11-14. By doing so, the court makes no finding as to whether other unexhausted claims in Witter's  
habeas petition meet or fail to meet the *Rhines* requirements for a stay.

